

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAY 22 2008

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MARCO MONTEJO-CASTANEDA,

No. 04-76527

I&NS No. A29-532-404

Petitioner,

MEMORANDUM*

vs.

MICHAEL B. MUKASEY,** Attorney
General,

Respondent.

Petition to Review a Decision of
the Board of Immigration Appeals

Argued and submitted May 13, 2008
Pasadena, California

Before: SILVERMAN and BERZON, Circuit Judges, and BENITEZ,***

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** Michael B. Mukasey is substituted for his predecessor, Alberto R. Gonzales, as Attorney General of the United States, pursuant to Federal Rule of Appellate Procedure 43(c)(2).

*** The Honorable Roger T. Benitez, United States District Judge for the Southern District of California, sitting by designation.

District Judge.

Marco Montejo-Castaneda, a native and citizen of El Salvador, petitions for review of the Board of Immigration Appeals' ("BIA") summary affirmance of an immigration judge's ("IJ") decision denying his application for cancellation of removal. He argues that the BIA's summary affirmance was procedurally improper and that the denial of his application was erroneous. Because we agree that the BIA erred in issuing a summary affirmance, we grant the petition for review and remand for further proceedings.

The BIA may summarily affirm without opinion an IJ's decision under certain conditions set forth in 8 C.F.R. § 1003.1(e)(4). Summary affirmance is inappropriate, however, when an appeal raises procedural due process claims. *Montes-Lopez v. Gonzales*, 486 F.3d 1163, 1165 (9th Cir. 2007).

Before the BIA, Montejo-Castaneda argued that the IJ violated his right to counsel and deprived him of an opportunity to present witnesses. AR 5-12. Because, by issuing a summary affirmance, the BIA has failed to address Montejo-Castaneda's procedural due process arguments, we grant the petition for review and remand for further proceedings. *Montes-Lopez*, 486 F.3d at 1165 ("by summarily affirming the IJ's decision, the BIA ignored – and denied review of – [the alien's] claim that his right to counsel was violated"). In light of our disposition, we need not address

Montejo-Castaneda's remaining arguments.

PETITION FOR REVIEW GRANTED AND REMANDED.